Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Rulemaking to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5 - 29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service;	)	CC Docket No. 92-297
	)	RM-7872; RM-7722
Applications for Waiver of the Commission's Common Carrier Point-to-Point Microwave Radio Service Rules;	)	
Suite 12 Group Petition for Pioneer's Preference	)	PP-22
University of Texas - Pan American Petition for Reconsideration of Pioneer's Preference Request Denial	)	

COMMENTS

Of Counsel

James R. Hobson
Jeffrey O. Moreno
Donelan, Cleary, Wood & Maser, P.C.
1275 K. Street, N.W.
Suite 850
Washington, D.C. 20005-4078

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GTE Service Corporation, on behalf of its domestic, affiliated, telephone, equipment and service companies

Daniel L. Bart
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036
202-463-5212

Its Attorney

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SUMMARY

GTE supports the Commission's proposal to redesignate the 28 GHz band for a new service called Local Multipoint Distribution Service ("LMDS"). This new service will provide the public a new alternative means of delivering one- and two-way video, data, and other telecommunications services. GTE also believes this new service will be useful in expanding educational programs such as Distance Learning.

GTE is also pleased that, as a policy matter, the Commission has not excluded any party from eligibility for LMDS licenses. However, as a statutory matter, the FCC's discretion to implement its policy may have been curtailed for some LMDS applications. It appears clear that a cable operator would be ineligible for a LMDS license to deliver video services. However, that statutory ineligibility would not apply to non-video services.

Whereas Local Exchange Carriers would not be ineligible for a LMDS license in their franchise, they would have a statutory bar on offering their own video programming over such facilities. Thus, the FCC must segregate video and non-video services in its analysis of LMDS issues, just as it must separate private and common carrier issues. If LMDS facilities are to offer competition to existing services, the FCC should ensure there is a level playing field with regard to parity of regulation on such competitive service providers. As services are demonstrated to be competitive, then the FCC should streamline or remove regulations to allow the full benefits of the competitive market to accrue.

It is not clear that LMDS will have any mobile applications, thus, Section 332 of the Communications Act may not apply to LMDS. However, Section 152 of the Communications Act will apply and the FCC must carefully assess the need for any preemption of state jurisdiction.

GTE supports the allocation of the 2 GHz of spectrum, divided equally between two licensees, and assigned on a Metropolitan Statistical Area ("MSA")/ Rural Service Area ("RSA") basis. There should be no set-asides of any of the spectrum. The FCC should not limit licensee flexibility in the selection of equipment, and, thus, FCC technical criteria should only be the minimum necessary to control interference. If there is a need to develop standards, industry fora are up to the task. In order to encourage investment in LMDS, the FCC should extend the license term to at least ten years, extend the construction period to five years, lower the coverage requirement to 75% of the population, but require initial service in 18 months. This will lower the entry barriers for minority participation, economically prove in LMDS at a lower threshold, provide a reasonable period to earn back the investment, yet bring service to the public sooner.

In order to ensure that the spectrum is used to enable systems to be built and not just to pad the pockets of spectrum speculators, the FCC should impose stringent anti-speculation requirements. If lotteries are to be used, they should not be a contingent winners' lottery, but instead only choose a new selectee if the initial winner is not qualified. To ensure that only qualified parties even consider applying for a license, the FCC should require strong technical and financial showings, performance bonds, access to programming for video systems, and letter perfect filings. Post-card lotteries should not be used since they encourage speculation in spectrum.

Finally, since no party opposed Suite 12's pioneer's preference request, since the rules are based substantially on Suite 12's development, and since Suite 12 appears to have satisfied the FCC's pioneer's preference criteria, it should be awarded a pioneer's preference for LMDS.

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COMMENTS

GTE Service Corporation, on behalf of its domestic, affiliated, telephone, equipment and service companies ("GTE"), hereby responds to the Commission's Notice of Proposed Rulemaking, Order, Tentative Decision, and Order on Reconsideration, released January 8, 1993 in this proceeding. ("NPRM" or "Notice").[1] In the NPRM, the Commission proposes a redesignation of use of the 28 GHz band from point-to-point microwave common carrier service to a Local Multipoint Distribution Service ("LMDS"). (NPRM, ¶1) The Commission also addresses pending applications for waiver of the Common Carrier Point-to-Point Microwave Radio Service rules filed in anticipation of

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1 8 FCC Rcd 557.

Commission action on the referenced Petitions for Rulemaking. (Id.)[2] The Notice also addresses two Petitions for Pioneer's Preference, one of which is before the Commission on a Petition for Reconsideration of the FCC's staff's action dismissing the request. (Id.)

INTRODUCTION

The Commission has initiated this NPRM in response to a Petition filed by the Suite 12 Group ("Suite 12"), a group of inventors who have engineered a millimeter wave component technology which can be used to offer video and other communications services in the 27.5 - 29-5 GHz frequency band ("28 GHz band"). In response to Suite 12's Petition, Video/Phone Systems, Inc. ("Video/Phone") proposed a local wireless broadband service in the 28 GHz band. Harris Corporation (Farinon Division) ("Harris") also filed a Petition for Rulemaking (RM-7722) suggesting that the FCC facilitate use of the 28 GHz band for point-to-point microwave applications by implementing a uniform channelization plan so that equipment manufacturers would have a standard to apply for the development of new technology. (NPRM, ¶2)

The FCC has tentatively decided to accommodate the Suite 12 and Video/Phone requests. The FCC states that: "The 28 GHz band is virtually unused, and the proposals before us, if developed to their apparent potential, will provide consumers with additional options by which to satisfy video and other telecommunications requirements." (NPRM, ¶3) The Commission has proposed

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2 The Commission has issued Public Notice that 48 Petitions for Reconsideration have been filed on the decisional portions of the Notice. (See 58 Fed. Reg. 12,566.) Comments on these Petitions for Reconsideration are due March 22, 1993.

to establish a new service, Local Multipoint Distribution Service or LMDS, and approve two licensees in each geographic area. The FCC wants to streamline the licensing process while deterring speculative abuses. The FCC has proposed minimal technical rules to accommodate multipoint video programming distribution, wideband video, data, and other telecommunications services. The proposed rules: (i) require service be available to 90% of the residents within a service area within three years, (ii) specify one-day filing windows, (iii) contemplate the use of lotteries or auctions to select licensees, and (iv) employ minority and diversity of ownership preferences. (Id.)

The Commission seeks comment on its various proposals as well as other issues such as: the regulatory status of licensees, regulation of common carriers, preemption, size of service areas, the requirement to serve minimum areas or populations, cross-ownership issues, licensee selection method, preferences, settlements, license term and transfer of control and assignment issues, application requirements, a "one-to-a-market" rule, financial showing obligations, construction requirements, application filing date, and fees.

The FCC also tentatively concludes to award a pioneer's preference to Suite 12 since the record before the Commission demonstrates that Suite 12 is the innovator of LMDS technology and no party has challenged Suite 12's claims regarding its developmental efforts. The FCC's proposed rules are based substantially on Suite 12's proposals. (NPRM, ¶63) The FCC proposes to award a license for LMDS to Suite 12 for either New York or Los Angeles. (Id. at ¶64)[3]

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3 The Commission also treats the University of Texas - Pan American ("UTPA") Petition for Reconsideration as a Petition for Review and affirms the staff's dismissal of UTPA's pioneer's preference request since "UTPA has provided no substantive information about any work that it has performed with regard to LMDS or similar technology." (NPRM, ¶68)

LMDS offers another opportunity for competitive forces to bring new services to the American public. Since the FCC is proposing flexible service rules allowing licensees to offer one- and two-way video services, data, and other telecommunications services, LMDS will be another competitive alternative to many existing services. LMDS may also be useful in Distance Learning applications and Classrooms Without Walls. GTE is encouraged by the FCC's actions to make another new spectrum-based service available to the public. GTE will offer its Comments on selected areas where the Commission has sought input.

DISCUSSION

GTE supports the FCC's conclusion not to award any set-asides.

The FCC notes that Suite 12 has demonstrated demand for LMDS by its operational system in Brighton Beach, New York. The significant number of waiver applications filed seeking to provide similar services also "indicates a significant interest in both the technology and the service" according to the FCC. (NPRM, ¶15) The FCC concludes that "there is strong public interest in the proposed redesignation" of the 28 GHz band for LMDS. (Id.) As a new source of competition for franchised cable companies, wireless cable companies, and other video service providers, LMDS will further the FCC's goal "of using the disciplines of the marketplace to regulate the price, type, quality and quantity of video services available to the public." (Id., ¶16) The Wireless Cable Association ("WCA") expressed a concern that Multichannel Multipoint Distribution Service ("MMDS") licensees would face undesirable competition from LMDS and, thus, WCA proposed that the FCC "set aside a portion of the 28 GHz band for MMDS operators . . . . " (NPRM, ¶¶18-19)

The FCC recently provided additional spectrum for wireless cable operators,[4] and, thus, concludes in the Notice not to "set aside" any portion of the 28 GHz band for MMDS licensees. GTE supports this conclusion.[5] Since one of the primary purposes of LMDS is to offer competitive alternatives for video delivery, no category of party should be accorded a "set aside" of the spectrum. Similarly, as an FCC policy matter, no category of party should be excluded from applying for a license in the new service. GTE urged the Commission to adopt a similar open entry policy in its consideration of spectrum for Personal Communications Services ("PCS") noting "pro-competitive policies further the public interest by facilitating the rapid introduction of new services, the lowering of rates, and increases in the quality of service."[6]

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4 Second Report and Order, Gen. Docket No. 90-54, 6 FCC Rcd 6792 (1991).

5 Similarly, GTE agrees with the FCC's decision to not reserve any portion of this band for point-to-point applications as suggested by Harris, since Harris provided no evidence of interest in this band for such applications and the band has lain fallow for years. (NPRM, ¶12) GTE opposes reserving one-half of the band for non-commercial use as suggested by the University of Texas. (NPRM, ¶19, n.6) Non-commercial applications and point-to-point transmission are two services that could still be carried on LMDS systems providing a wide range of services. In fact, GTE is hopeful that Distance Learning, Classrooms Without Walls, and other educational applications will be important uses of LMDS.

6 See GTE's Comments, GEN Docket No. 90-314 (Nov. 9, 1992), at 26-28, citing Reconsideration of Rules Concerning the Use of Subsidiary Communications Authorization, 55 Rad. Reg. 2d (P & F) 1607, 1614 (1984), rev'd on other grounds California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986); Cellular Communications Systems, 86 F.C.C. 2d 469, 474 (1981), modified 89 F.C.C. 2d 58 (1982); Multipoint Distribution Service, 45 F.C.C. 2d 616, 622 (1974).

GTE urges the FCC to limit its technical rules to those necessary for interference control.

The Commission proposes to initially license two blocks of 1000 megahertz each to two different carriers. (NPRM, ¶20) The blocks are then further subdivided into channels of 20 MHz each, which the FCC proposes could be used or leased, in one or both polarization directions, in each cell, to provide a wide variety of services. (Id.) Much of this structure is based on the particular technology used by Suite 12.

GTE believes the FCC should allow potential licensees as much technical flexibility as possible. The FCC should not lock in on a particular technology that may not be optimum for other applications and may not be the most spectrum efficient or otherwise provide the right technical characteristics. The FCC has learned in the Cellular Radio Service[7] context that technologies can change faster than the FCC's ability to keep up with the changes. Flexible service rules and minimal technical rules serve the public interest. To the extent that technical criteria beyond interference criteria are necessary, industry fora exist to develop consensus positions at appropriate times. The FCC should limit its technical rules to those required to avoid interference between the licensees of LMDS and other licensed spectrum users. Experience has shown that artificial regulatory constraints on the flexibility to respond to changing or new consumer needs disserves the public interest. As the FCC noted in its NPRM for PCS:

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7 GTE will use an upper-case "C" to refer to the Cellular Radio Service, and a lower-case "c" to refer to cellular network architectures such as those used in the Cellular Radio Service and in LMDS.

> [T]he initial detailed technical and compatibility standards governing the [C]ellular service provided for a rapid and highly successful development of the service but subsequently impeded both development of new services and accommodation of the large number of additional subscribers anticipated in the future. (7 FCC Rcd 5676 at ¶24, emphasis added)

GTE believes FCC technical rules beyond interference criteria will, over the long term, impede new services. Suite 12's technology is analog in a world that is moving to digital. Suite 12 requires 20 MHz per channel. Other technologies could be more spectrum efficient than that or offer other innovations. While the service may initially be deployed by some licensees using Suite 12's technology, the competitive equipment marketplace will design newer, better, more efficient technologies. The FCC should allocate sufficient spectrum to allow LMDS -- utilizing currently available technology -- to be competitive with cable systems that will be offering up to 500 channels, but the FCC should not force the use of that technology over the long haul.[8] Given that LMDS will have to compete with large capacity cable systems, 1000 MHz, which would allow approximately 50 video channels per licensee using Suite 12's technology, seems appropriate. However, no channelization should be specified in the rules to allow other providers to use other technical solutions.

The regulatory status of LMDS operators needs to be carefully analyzed.

The Commission has not proposed any exclusions from eligibility for any category of applicant. The applicants must, however, be legally, financially, technically, and otherwise qualified to render the services proposed. (See

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8 GTE agrees with the FCC that any spectrum-based service that is intended to be deployed near the Mexican or Canadian borders, will require coordination to insure interference protection. (NPRM, ¶24, n.7)

proposed Section 21.1001) Thus, Local Exchange Carriers ("LECs") as well as other legally, technically, and financially qualified parties could apply for LMDS licenses.

The Commission has also tentatively concluded, at least as to video services, to allow LMDS providers to choose whether they provide service on a common carrier or non-common carrier basis. (NPRM, ¶26) This is similar to the current treatment for MMDS. With regard to non-video services offered by LMDS operators, the FCC has asked for further comment. (Id.) The Commission also asks for comment on the jurisdictional implications of allowing election by a LEC of non-common carrier status in the proposed service. (Id.)

GTE believes these proposals raise important issues that will require careful analysis. The distinctions between services are blurring as a digital bit stream can represent voice, data, or video. The distinctions between common carriage and private carriage are also blurring with many similar services offered by both common carriers and private carriers. However, the regulatory burdens carried by common carriers are significantly greater than the burdens carried by private carriers and the FCC cannot have truly fair competition without establishing parity of regulation. Once parity is established, the FCC should then relax or streamline its regulation to allow the benefits of competitive delivery of services to prevail. With respect to LMDS, this requires a careful analysis of the current regulatory and statutory burdens placed on various categories of parties.

The FCC must analyze the ownership standards applicable to LMDS.

At paragraph 27 of the NPRM, the Commission tentatively concludes that "no LMDS operator will have a monopoly or near-monopoly position." Despite this conclusion, GTE and other LECs effectively would be treated as monopolists

under the present legal restrictions on telephone company provision of video programming. Program ownership attribution standards ranging from 1 to 5% severely limit the role of LECs in LMDS.[9]

GTE has supported the Commission vigorously in its recommendation to Congress for repeal of the statutory cross-ownership restriction, 47 U.S.C. §533(b). Nevertheless, GTE recognizes that, until Congress actually changes the law, the Commission must work within it. However, the agency has the discretion to define the threshold of "ownership" for purposes of Sections 613(b) and 602(2) of the Cable Act of 1984. Therefore, GTE reiterates its suggestion[10] that the Commission raise the ownership attribution threshold in all pending proceedings -- LMDS, cable re-regulation, video dial tone, etc. -- so that non-controlling interests are not cognizable under the limiting rules.

If the Commission nevertheless declines to relax the limits which restrict LECs in the use they could make of LMDS channels, it should apply to cable operators -- whom the Congress has found "dominant" in video delivery in adopting the 1992 Cable Act -- the cross-ownership restrictions now found in the like service of MMDS, 47 C.F.R. §21.912.[11] Parity of regulation requires similar treatment.

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9 Section 63.54 of the Rules, 47 C.F.R. §63.54, as recently modified by Second Report and Order, CC Docket No. 87-266, 7 FCC Rcd 5781 (1992).

10 GTE Reply Comments, CC Docket No. 92-264 (Mar. 3, 1993).

11 However, this ban should be limited to the video services only. GTE does not argue for burdens any greater than those borne by other parties. Cable operators should not be barred by the 1992 Cable Act from providing non-video services.

GTE believes the 1992 Cable Act bans cable LMDS licensing.

The Commission has tentatively concluded (NPRM, ¶33) that cross-ownership restrictions should not be imposed for LMDS service. This conclusion is in direct contradiction to the mandate of the Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385, Section 11, amending Section 613(a) of the Cable Act of 1984.[12] Section 11 prohibits cable operators from holding a license for "multichannel multipoint distribution service." The clear intent of Congress was to prevent cable operators from using their monopoly position to dominate radio services on which "wireless cable" competitors depend.

As the Commission acknowledges (NPRM, ¶34), "it appears that the intent of Congress to facilitate competition in the video distribution services would include a ban on cable ownership of LMDS licenses if used to distribute video programming." Congress was not legislating exclusively as to "MMDS" but was concerned with all "mmds" service.[13]

As the Commission itself observes in ¶34, LMDS and MMDS are very similar. It is inconceivable that Congress would allow cable operators to avoid Section 11 of the 1992 Act by sanctioning cable ownership or operation of a 50-channel LMDS system while forbidding a cable operator to hold a license for a 2, 4 or 8-channel MMDS system. The point is all the stronger if LMDS service is structured in a local duopoly, as proposed.

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12 47 U.S.C. §533(a)(2).

13 The use of lower-case letters indicates a generic rather than a specific intent. Surely the statutory term "multichannel multipoint distribution services" includes LMDS as conceived by the Notice.

There is no similar statutory prohibition on LEC licensure to LMDS, nor is FCC regulatory restriction required.[14] Any anti-competitive concerns about LEC use of LMDS already have been anticipated by the cross-ownership restrictions in the 1984 Cable Act and the attribution standards in the Commission's video dial tone decision.[15] As stated above, GTE does not support the telco video programming restrictions, but will work within them until they are modified or repealed.

The Multichannel Video Programming Distributor definition could apply to some LMDS operators.

The Commission asks, at note 13, whether an LMDS licensee will be a multichannel video programming distributor ("MVPD") under the 1992 Cable Act. This determination should be based on the same factors already identified in the cable reregulation rulemakings. Specifically, GTE agrees with the Commission's tentative conclusion in Broadcast Signal Carriage Issues, Notice of Proposed Rulemaking, MM Docket No. 92-259 (released November 19, 1992) at ¶42. There, the Commission determined that the statutory definition of MVPD should be interpreted as differentiating between an entity performing a delivery function with respect to the video signal, and an entity that actually sells programming directly to the home viewer. Thus, LMDS providers are only MVPDs if they

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14 LECs are not forbidden to hold MMDS licenses.

15 Thus, there are no further regulatory responses required as discussed in NPRM footnote 12.

actually make available programming for purchase through direct interaction with the home viewer.[16]

As the Commission looks at the non-video portions of LMDS, it must ensure that competing services have comparable regulations and should relax those regulations across all operators to allow for the benefits of competition.

The Commission has correctly bifurcated its analysis into the issues related to delivery of video services and those related to non-video services. There are many additional analyses that must accompany a video offering due to the statutory and regulatory frameworks created for such offerings. Similarly, non-video offerings must be analyzed against different frameworks, including statutory and regulatory goals. In its Comments in the FCC's PCS Docket,[17] GTE elaborated at length on the substantial differences between the obligations of common carriers and private carriers. Any regulatory scheme must recognize the larger regulatory environment for all affected telecommunications services. Simply labeling a service as private carriage or common carriage masks a host of important, significant, individual issues. These issues include price discrimination, state regulation, obligation to serve, resale obligations, excise taxes, alien ownership restrictions, application fees, forfeiture guidelines, Americans with Disabilities Act, Telecommunications Relay Service obligations, and more. These are all complex issues and parity of regulation for competitive services is a difficult task to master. However, if the goal is truly competitive

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16 The Commission's Report and Order in MM Docket No. 92-259, adopted March 11, 1993, affirmed this characterization of multichannel video programming distributor. (See News Release, Report No. DC-2364, March 11, 1993, at 4.)

17 See GTE PCS Comments at 49-55, GEN Docket 90-314 (Nov. 9. 1992).

services, then the problems must be solved. If parity exists, then the FCC should scale back the regulation for all operators to allow the competitive market to do its work and select the most efficient providers. To the extent the FCC allows the LMDS operator to pick one regulatory scheme or another, this is in and of itself a form of "parity," as long as one class of LMDS operators are not "forced" to operate under one particular form of regulation.[18]

It is not clear that Section 332 analysis is required.

At note 10 of the NPRM, the FCC concludes that, "[t]o the extent that LMDS could be used as a resold telephone service, . . . under Section 332 of the Communications Act, a private land mobile radio licensee may not resell interconnected telephone service for profit." It is not clear that Section 332 analysis is required unless LMDS can somehow be classified as a "mobile" service. Section 332 is limited to private land mobile licensees. The descriptions of LMDS in the Notice are of fixed services.[19] GTE notes, however, that in its Petition for Rulemaking, RM-7872, Suite 12, at 6, footnote 14, stated: "[R]ecent evidence indicates that [LMDS] can also operate in a mobile environment with certain consumer receivers operating as collector nodes for distribution to and from the central node." It is not at all clear what

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18 GTE also agrees with the FCC's determination that for those LMDS operators choosing to be regulated as common carriers for part of all of their systems, they should be classified as "non-dominant" carriers, and subject to streamlined tariff regulation as with MMDS. (NPRM, ¶27) The FCC has correctly identified the various competitive options to LMDS for both video delivery and other telecommunications services.

19 Common carriage in the fixed radio services is identified by the legal compulsion/indifferent holding-out tests of National Association of Regulatory Commissioners v. FCC, ("NARUC I"), 525 F.2d 630 (1976).

mobile applications Suite 12 is proposing. Mobile applications at 28 GHz would be a very difficult technical challenge. However, if the Commission determines that there are private land mobile applications of LMDS, then GTE agrees that this is the correct legal interpretation and that any such LMDS entity engaging in the resale of telephone service for profit must be regulated as a common carrier.

Preemption must be analyzed differently for video and non-video services.

The FCC has tentatively concluded that for LMDS licensees choosing non-common carrier status, to the extent such systems provide video entertainment, state entry and rate regulation should be preempted. (NPRM, ¶¶28-29) However, with respect to LMDS licensees providing non-video common carrier telecommunications services, the FCC has jurisdiction over only the interstate portions of those services unless the intrastate services are not severable from the interstate services and the state regulations thwart or impede federal law and policies. (NPRM, ¶29) The Commission advises that at this time it is not in a position to know, for LMDS telecommunications services, "whether it is appropriate to preempt state entry and/or rate regulation of common carrier LMDS." (Id.) Further, the Commission does not have any evidence that any particular state regulatory policies regarding inseverable intrastate LMDS services would thwart or impede its efforts to establish this new service. It asks parties, especially Suite 12 and Video/Phone to provide information regarding the structure of system operations so the FCC can determine the interstate/intrastate nature of potential telecommunications services and whether any preemption of state regulation of intrastate common carrier non-video services is necessary. (Id)

In its analysis, the FCC distinguishes between private and common carriage on the one hand, and video and non-video services on the other. Sometimes the Notice refers to "video entertainment" (NPRM, ¶28), sometimes to "video service" (NPRM, ¶29). It appears the FCC assumes all video transmission to be inherently interstate in nature.

The 1984 Cable Act, however, only precludes states from common carriage regulation of "cable service." Cable service has a limited definition. It is either television-style entertainment or "other" service "made available to all subscribers generally." 47 U.S.C. §522(6). Clearly, there can be video services which are not cable service, as defined. Beyond the 1984 Cable Act, the FCC's declaration that video services are interstate goes back to the late 1960s and was upheld on the basis of broadcast TV retransmission.[20] This line of authority would not appear to apply to locally-originated video whose signals remain in-state.[21]

With respect to the non-video services, a lot will depend on the nature of the offering and the extent of inseverability and conflict between federal and

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20 United States v. Southwestern Cable Co., 392 U.S. 157, 168-169 (1968); New York State Commission on Cable Television v. F.C.C., 669 F.2d 58, 65 (2d Cir. 1982); cited by the FCC in the Notice at ¶29, are examples of this line of authority.

21 The FCC analyzed another radio service along similar lines. In its Report and Order establishing the 800 MHz Air-to-Ground ("ATG") Service, 5 FCC Rcd 3861 (1990) ("800 MHz ATG Order") at paragraph 36, the FCC concluded that even though 800 MHz ATG Service would be provided by nationwide networks and the service would be largely an interstate communications service: "Identification of the originating (as well as terminating) point of intrastate calls on intrastate flights does appear feasible, ... Accordingly, in regulating such service, we can see no reason at this time to preempt state rate or entry/exit regulation with respect to intrastate calls on intrastate flights." LMDS signals that originate locally and stay within the state would seem to be similar to intrastate ATG calls.

state policies. Section 2(b) of the Communications Act offers a powerful shield against federal preemption of common carrier intrastate services.[22] However, should the FCC determine that some of the non-video services will be offered on a private carrier basis, it should not create an environment where some parties are forced to provide the service as common carriers whereas other parties are classified as private carriers, as it did when it allowed Specialized Mobile Radio Service companies like FleetCall and Dial Page, L.P. to compete as private carriers against common carrier Cellular operators. The inventors of LMDS have been requested by the FCC to provide information in their Comments describing the nature of proposed services so the FCC can determine the interstate/intrastate nature of the services. (NPRM, ¶29) When the record is supplemented, it will be easier to see if this information can support federal preemption of the states.

The Commission should use MSA/RSA Service Areas.

The Commission proposes to license LMDS using "the 487 'Basic Trading Areas' ("BTAs") identified in the Rand McNally 1992 Commercial Atlas and Marketing Guide, 123d edition, pp. 36-39, plus Alaska and Puerto Rico, for a total of 489 regional licenses encompassing all land areas within the United States."[23] The Commission references its PCS Notice of Proposed Rule

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22 See NPRM, ¶29 for citations to cases limiting the Commission's exercise of its preemptive power. There are numerous other examples.

23 As an initial matter, GTE notes that there is land area within the FCC's jurisdiction that is not encompassed by this Service Area scheme. For example, the Commonwealth of the Northern Mariannas would not be in any of the identified BTAs, yet this territory is within the Commission's jurisdiction. Thus, the proposed scheme does not include all land areas

Making for discussion of the relative merits and drawbacks of smaller and larger service areas in connection with new services like Personal Communications Services. (NPRM, ¶30)

The FCC's discussion of size of service area must also be considered in light of the Commission's tentative conclusion to require service to be provided to a minimum of 90% of the population in a service area within three years of being granted a license. Alternatively, the FCC asks whether the minimum service should be measured as a percentage of the area instead of population. (NPRM, ¶32)

For the reasons cited by GTE in its PCS Comments, GTE believes the Metropolitan Statistical Area ("MSA")/ Rural Service Area ("RSA") license area scheme should be used for new services that are not inherently nationwide, or otherwise demand some larger, or smaller license area.[24] The MSA/RSA model

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within the United States, as the term "United States" is defined in the Communications Act.

24 See GTE's PCS Comments (Nov. 9, 1992), at 32-35. GTE sees no reason to use Areas of Dominant Influence ("ADI") as a reference for LMDS. Arbitron, an audience measurement firm, defines ADI as follows:

> [A] geographic survey area based on measurable patterns of television viewing. Each county in the contiguous United States is assigned exclusively to one ADI. The assignment of a county to an ADI is based on the shares of the county's total estimated viewing hours. The market whose home stations achieve the largest total share (percentage) of viewing is determined to be the "dominant influence" in that county, and that county is assigned to that market's ADI. (7 FCC Rcd 8055 at ¶18)

GTE does not see the relevance of using a broadcast audience measurement to define coverage areas for a narrowcast service. Moreover, a public standard such as MSA/RSA is preferable to the private measurement devised by Arbitron which does not include all areas in the United States.

was overwhelmingly the most popular choice among the parties filing Comments in the PCS Docket. The MSA/RSA markets have also been used in licensing Interactive Video and Data Service ("IVDS") systems. For IVDS the Commission noted: "[T]hese cellular service areas are well known to the communications industry and cover the entire country."25

Given the cellular-like nature of LMDS, there may be economies to using the MSA/RSA model since antenna towers for the Cellular service may be able to be used for LMDS transmitters. This would lower the cost of introducing LMDS and make it available to the public sooner. Given the proven benefits and administrative convenience of using well-defined and well-understood MSA and RSA service areas no other size of service area should be used.[26]

The FCC should also alter its tentative decision to require 90% of the population in a service area to be covered. Since hardware is expensive, and if the license area is large, this will be a formidable barrier to entry and widespread deployment of LMDS. Cellular systems had a lower coverage requirement, and it is still difficult to justify deployment of the technology in many areas of the country. If the MSA/RSA model is used, and the FCC lowers the coverage

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25 Interactive Video and Data Services, 7 FCC Rcd 1630,1638 (1992).

26 Using the MSA/RSA service areas for LMDS licensing would create entry opportunities for a diverse and large range of potential service providers with different approaches and service concepts. This would also further the FCC's goal for LMDS to have a framework that would support diversity and minority preferences. (NPRM, ¶37) The MSA/RSA model would offer a larger number of license opportunities for minority parties or others who own few mass media licenses than some of the other service area models considered. Given the financial requirements to build a system encompassing 90% or even 75% of the population and operate the system for one year, the smaller geographic sizes of MSAs/RSAs compared to BTAs or Major Trading Areas ("MTAs"), would also support minority participation. As discussed infra, a longer license term will also be necessary to attract capital for such systems.

requirement to 75% of the population in a service area after five years, then LMDS will economically prove in at a lower demand level. If it is the FCC's intent to "encourage" LMDS, enhance "speed of service to the public," and expeditiously serve the needs of "rural areas," then the construction coverage threshold should be lowered, the period allowed for construction extended, the license term extended, and the license areas should be smaller.[27]

As discussed below, GTE supports a longer license term. Coupled with that, GTE believes the construction period for the initial system should be five years. The first cells providing service to the public should be required to be operational 18 months after licensing, but the total system covering 75% of the population should have a five year interval. After that five year period, any unserved areas should become available for licensing, similar to the FCC's unserved policy in the Cellular Radio Service. This will allow the initial LMDS operator a reasonable period to construct the system; will require initial service to the public in 18 months; will reduce the capital requirements for such systems, thus, encouraging minority participation and wider deployment; and will not allow spectrum to be tied up for a prolonged period before it becomes available for re-licensing.

GTE supports anti-speculation rules and a license term for LMDS of at least ten years.

The FCC has proposed a license term of five years, a renewal expectancy, and a bar on license transfers until after the system has been constructed and in fact is serving the public. GTE supports the FCC's goal to

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27 Use of MSA/RSA service areas will still provide LMDS operators with a sufficiently large geographic area to be competitive with other video providers.

reduce speculation in spectrum. Thus, GTE supports the Commission's proposal to bar license transfers until after construction completion. In a recent Memorandum, Opinion and Order denying an IVDS applicant's plan to "settle" license contests ahead of time,[28] the Private Radio Bureau Chief articulated the Commission's anti-speculation policy:

> In developing rules and policies for IVDS we were guided by our experience in other radio services where licenses generally are decided by lottery. Our experience in these cases has been that (1) there is a growing problem with the filing of speculative applications, (2) agreements such as the one proposed [by] Mr. Rodriguez makes filing applications more attractive to those who wish only to speculate and (3) the usefulness of settlement agreements in situations where there is a high volume of applications is far outweighed by the problems they cause.[29]

GTE, thus, supports the FCC's tentative conclusion (NPRM, ¶38) to forbid any settlements among applicants for LMDS and any alienation of interest in an application for LMDS.

However, GTE does not see why the FCC should limit the LMDS license term to only five years. Under the FCC's proposal, if an applicant does not complete construction of the system to the minimum construction threshold until three years after license grant, this would only allow two years to try to earn enough revenue to cover the costs of the system. This is an extremely short period and works counter to the FCC's goal to encourage widespread deployment of LMDS. Such a short period will not attract capital to such systems, and for those that are built, this shortened period of cost recovery will

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28 See Memorandum, Opinion and Order, In the Matter of Request for a Declaratory Ruling concerning arrangements between applicants for the Interactive Video and Data Service, DA 93-228 (Mar. 4, 1993) ("IVDS Declaratory Order").

29 IVDS Declaratory Order at ¶4, footnotes omitted.